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MEMORANDUM
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TO: Docket Control 2010 NOV -5 A 10: 00

FROM: Steven M. Olea
Director
Utilities Division

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

DATE: November 5, 2010

RE: IN THE MATTER OF THE APPLICATION OF ATC OUTDOOR DAS, LLC
FOR APPROVAL OF A CERTIFICATE OF CONVENIENCE AND
NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATIONS
SERVICES SUCH AS NON-SWITCHED LOCAL TRANSPORT SERVICES
FOR WIRELESS CARRIERS (DOCKET NO. T-20595A-08-0278)

Attached is the Staff Report for the above referenced Application. The Applicant is applying for approval to provide the following services:

- Private Line Telecommunications Services

Staff is recommending approval of the Application with conditions.

SMO:PJG:red

Originator: Pamela J. Genung

Attachment: Original and thirteen copies

Arizona Corporation Commission

DOCKETED

NOV -5 2010

DOCKETED BY	
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SERVICE LIST FOR: ATC OUTDOOR DAS, LLC
DOCKET NO. T-20595A-08-0278

Mr. Gerard Ainsztein
Senior Vice President
400 Regency Forest Drive, Suite 300
Cary, North Carolina 27518

Mr. Michael T. Hallam
Lewis & Roca L.L.P.
40 North Central Avenue, Suite 1900
Phoenix, Arizona 85004

Ms. Janae Walker Bronson
Attorney
ATC Outdoor DAS, LLC
10 Presidential Way
Woburn, Massachusetts 01801

Ms. Janice Alward
Chief Counsel, Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Mr. Steven M. Olea
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Ms. Lyn Farmer
Chief Administrative Law Judge, Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

STAFF REPORT
UTILITIES DIVISION
ARIZONA CORPORATION COMMISSION

ATC OUTDOOR DAS, LLC
DOCKET NO. T-20595A-08-0278

IN THE MATTER OF THE APPLICATION OF ATC OUTDOOR DAS, LLC FOR
APPROVAL OF A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE
INTRASTATE TELECOMMUNICATIONS SERVICES SUCH AS NON-SWITCHED
LOCAL TRANSPORT SERVICES FOR WIRELESS CARRIERS

NOVEMBER 5, 2010

STAFF ACKNOWLEDGMENT

The Staff Report for ATC Outdoor DAS, LLC, Docket No. T-20595A-08-0278 was the responsibility of the Staff member listed below. Pamela J. Genung was responsible for the review and analysis of the Application for a Certificate of Convenience and Necessity to provide intrastate telecommunications services such as non-switched local transport services for wireless carriers.

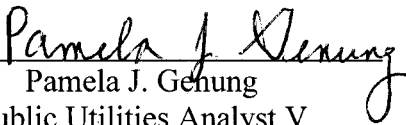

Pamela J. Genung
Public Utilities Analyst V

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1. INTRODUCTION

On May 30, 2008, ATC Outdoor DAS, LLC ("ATC" or "Applicant") filed an Application for a Certificate of Convenience and Necessity ("CC&N") to provide non-switched local transport services for wireless carriers within the State of Arizona. The Applicant also petitioned the Arizona Corporation Commission ("Commission") for a determination that its proposed services should be classified as competitive.

On July 7, 2008, Staff issued its First Set of Data Requests to ATC. On August 5, 2008, ATC provided information in response to Staff's First Set of Data Requests. Since that time, additional information has been provided to Staff via email by Michael T. Hallam, the Applicant's Attorney.

Staff's review of this Application addresses the overall fitness of the Applicant to receive a CC&N. Staff's analysis also considers whether the Applicant's services should be classified as competitive and if the Applicant's initial rates are just and reasonable.

2. TECHNICAL CAPABILITY TO PROVIDE THE REQUESTED SERVICES

ATC proposes to offer non-switched local transport and backhaul services of voice and data signals, primarily for wireless telephony and data providers throughout the State of Arizona. ATC plans to provide these services through a combination of its own facilities and facilities to be leased from other telecommunications carriers.

The Applicant's services will be offered through a Distributed Antenna System ("DAS") network. ATC's radio frequency ("RF") transport services will use optical technology, including multiwavelength optical technology. RF transport services will connect customer provided wireless capacity equipment to customer-provided or ATC-provided bi-directional RF-to-optical conversion equipment at a hub facility. The hub facility can be customer-provided or ATC-provided. The conversion equipment will allow ATC to accept RF traffic from the customer and then send be-directional traffic transmission across the appropriate optical networks. At the remote end, ATC or the telecommunications company will provide RF-to-optical conversion equipment to allow bi-directional conversion between optical signals and RF signals. RF signals can be received and radiated at this remote node.

ATC was founded on December 20, 2007. ATC is wholly owned by SpectraSite Communications, LLC which is wholly owned by SpectraSite, LLC. The parent company, American Tower Corporation ("American Tower") is the sole member and manager of SpectraSite, LLC. In 2005, American Tower merged with SpectraSite Communications, Inc. expanding its ownership to over 22,000 communications sites, including 21,000 wireless towers, 400 broadcast towers, and 100 DAS sites. American Tower now owns and operates over 30,000 wireless and broadcast communications sites in the United States, Mexico, and Brazil. American Tower is headquartered in Boston, Massachusetts and has local offices nationwide. American Tower and its subsidiaries are currently authorized to conduct business in all 50 states and have a

total of 991 employees in the United States, 117 employees in Mexico, 86 employees in Brazil, and 233 employees in India.

ATC currently does not have any employees that are exclusively dedicated to ATC's operations. ATC's employees are employees of American Towers, Inc. an affiliate of ATC, who dedicates their time to addressing the needs of both Companies. Meanwhile, the telecommunications experience of ATC's top two executives exceeds a combined total of thirty-one years.

ATC does not plan to have a customer service center or employees in Arizona. However, services and operations to Arizona customers will be handled by employees of American Towers, Inc. which has employees in Arizona. ATC's Arizona customers will have access to a customer hotline 24 hours a day, seven days a week.

ATC indicated, in its responses to Staff inquiries, that it is authorized to provide telecommunications services in thirty-one states/jurisdictions. (See Attachment A). Of those thirty-one states/jurisdictions, ATC is currently providing services similar to those it intends to offer within Arizona in Michigan. Staff has contacted fifteen of these states/jurisdictions and found that ATC is authorized to provide telecommunications services and that no complaints have been filed against ATC. Further, a search of the Federal Communications Commission ("FCC") website found that there have been no complaints filed against ATC. Based on all of the above information, Staff believes ATC possesses the technical capabilities to provide the services it is requesting the authority to provide.

3. FINANCIAL CAPABILITY TO PROVIDE THE REQUESTED SERVICES

On August 4, 2010, the Applicant provided audited consolidated financial statements of its parent company, American Tower Corporation and Subsidiaries, for years ending 2005 through 2009. These financial statements list total assets of over \$8.5 billion; total equity of over \$3.3 billion; and net income of approximately \$247 million for the full year 2009. The Applicant provided notes related to the financial statements. ATC has also indicated that it will rely on the financial resources of its parent company.

The Applicant initially stated in its proposed Tariff (reference Sections 2.2.2 on Page 9 of ATC's proposed Arizona Tariff No. 1) that it may collect a deposit for service from any applicant or customer whose financial responsibility is not established to the satisfaction of the Company. In response to Staff's First Set of Data Requests, ATC has indicated that it does not intend to collect deposits and will remove the language in its tariff allowing for collection of deposits. Since ATC is requesting approval to provide non-switched local transport and backhaul services primarily to other carriers, not to individuals or small businesses, and will not be collecting deposits, advances, or prepayments from its customers, Staff does not believe a performance bond or irrevocable sight draft Letter of Credit is necessary.

4. ESTABLISHING RATES AND CHARGES

The Applicant would be providing service in areas where an incumbent local exchange carrier ("ILEC"), along with various competitive local exchange carriers ("CLECs") and interexchange carriers ("IXCs") are providing telephone service. Therefore, the Applicant would have to compete with those providers in order to obtain subscribers to its services. The Applicant would be a new entrant and would face competition from both an incumbent provider and other competitive providers in offering service to its potential customers. Therefore, the Applicant would generally not be able to exert market power. Thus, the competitive process should result in rates that are just and reasonable.

In general, rates for competitive services are not set according to rate of return regulation. ATC estimates that its net book value or fair value rate base, at the end of the first twelve months of operation to be zero. The rate to be ultimately charged by the Company will be heavily influenced by the market. While Staff considered the fair value rate base information submitted by the Company, it did not accord that information substantial weight in its analysis.

The rates proposed by this filing are for competitive services. ATC provides service to its customers on a site-by-site basis. Therefore the vast majority of its customers are expected to purchase transport and backhaul services under individual case basis ("ICB") contracts with ATC. For ATC customers that choose not to negotiate an ICB contract, those customers will be allowed to purchase services in accordance with the rates established in ATC's proposed tariff.

Staff has reviewed the rates to be charged by the Applicant. ATC's rates are for highly competitive services and the services are targeted for sophisticated carriers and communications companies. These carriers and companies are experienced in negotiating charges and other contract terms. In addition, they have adequate resources to protect their business interests while negotiating for the best market prices for services. Although both an initial rate and a maximum rate may be listed for each competitive service offered, ATC's proposed tariff contains initial rates that equal the maximum rates. The rate charged for a service may not be less than the Company's total service long-run incremental cost of providing the service pursuant to A.A.C. R14-2-1109. The proposed rates are comparable to the rates charged by other carriers operating in the State of Arizona. Therefore, Staff believes that ATC's proposed rates are just and reasonable.

5. REVIEW OF COMPLAINT INFORMATION

The Applicant has neither had an Application for authority to provide service denied, nor had its authority to provide service revoked in any state. There are, and have been, no formal complaint proceedings involving the Applicant. There have not been any civil or criminal proceedings against the Applicant. The Corporations Section has indicated that ATC is in good standing and the Consumer Services Section reports no complaints have been filed in Arizona from January 1, 2007 to March 8, 2010.

The Applicant indicated that American Tower Corporation, the parent entity, has on limited occasions been involved in shareholder derivative suits and certain other claims arising in its ordinary course of doing business. ATC has stated that these claims are unrelated to the provision of the telecommunications services that it seeks to provide within the State of Arizona. Notwithstanding, ATC disclosed the following information concerning past technical violations and investigations concerning its parent company, American Tower Corporation.

- a. As indicated in ATC's Application and in American Tower Corporation's publicly available forms 10K, in 2001 American Tower Corporation and the District Attorney for the County of Santa Clara, California agreed to a Stipulated Order concerning failure to file proper forms under the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA") and other environmental statutes relative to its fuel storage and underground tanks. A copy of the Final Judgment is included as Attachment A-12 to ATC's Application. Staff has verified with the Applicant, by way of ATC's response to PJG 1-10 of Staff's First Set of Data Requests that ATC is in full compliance with the 2001 Stipulated Order. The Stipulated Order, which was effectively a consent decree, expired in 2006.
- b. In June 2005, the Antitrust Division of the Department of Justice issued Civil Investigative Demands concerning American Tower Corporation's merger with SpectraSite, Inc. The investigation was a routine part of the merger transaction.¹ American Tower Corporation fully complied with the investigation and it closed on October 24, 2005.
- c. In November 2005, American Tower Corporation entered into a Facilities Audit Agreement with the United States Environmental Protection Agency ("EPA") that provides for payment of penalties as a result of non-compliance with certain notice and record-keeping requirements. Pursuant to the Facilities Audit Agreement, American Tower Corporation conducted audits of approximately 12,500 towers. American Tower Corporation disclosed approximately 200 violations of EPCRA reporting violations. In November 2008, American Tower Corporation paid a penalty of approximately \$35,000 under the Facilities Audit Agreement, which satisfied its obligation under the agreement.
- d. During May – August 2006, American Tower Corporation received a letter of informal inquiry² from the SEC Division of Enforcement, a subpoena³ from the

¹ In its October 6, 2010 email response through its Attorney, ATC indicated that the transaction did not require approval pursuant to an exception to the Hart Scott Rodino Antitrust Improvements Act.

² On May 18, 2006, American Tower Corporation received a letter of informal inquiry from the SEC Division of Enforcement requesting documents related to stock option grants and stock option practices. The inquiry is focused on stock options granted to senior management and members of the Board of Directors during the period 1997 to 2006. American Tower Corporation has become aware that a former officer of the Company has received a "Wells" notice from the SEC which affords such individual the opportunity to make a submission to the SEC with respect to

United States Attorney's Office for the Eastern District of New York, and a Document Request from the Internal Revenue Service for information concerning stock option granting practices. ATC indicated, via email⁴, that the investigation was ongoing, but in its final stages. American Tower Corporation further stated that it has fully cooperated with all document and information requests. An additional email update to Staff on October 6, 2010, stated that it has been more than four years since the Department of Justice, Securities and Exchange Commission, and the Internal Revenue Service originally sought information from American Tower Corporation. Since the investigations have been dormant for quite some time, it is American Tower Corporation's belief that all three agencies have terminated its investigations.

- e. In August 2007, American Tower Corporation received a request for information from the Department of Labor ("DOL") with respect to the Company's retirement plan and the previously mentioned stock option grants. American Tower Corporation stated that it has complied with all requests for information. On October 15, 2010, ATC's Attorney provided via email a copy of a letter from the DOL, dated September 11, 2008, which states that its review has been concluded and that it contemplated no further action at this time.

In addition, a securities class action was filed on May 26, 2006 in United States District Court for the District of Massachusetts, and amended in March 2007, against American Tower Corporation and certain of its current and former officers by John S. Greenebaum. The class action alleged that the defendants violated federal securities laws in connection with public statements made relating to stock option practices and related accounting. In February 2008, the court preliminarily approved a settlement American Tower Corporation had reached with the plaintiffs. The settlement provided for a payment by American Tower Corporation of \$14.0 million and led to a dismissal of all claims against all defendants in the litigation. The settlement amount was paid in March and April of 2008.

On May 24, 2006 and June 14, 2006, two shareholder derivative lawsuits were filed in Suffolk County Superior Court in Massachusetts by Eric Johnston and Robert L. Garber, respectively. The lawsuits were filed against certain of American Tower Corporation's current and former officers and directors for alleged breaches of fiduciary duties and unjust enrichment in connection with American Tower Corporation's historical stock option granting practices. The lawsuits also named American Tower Corporation as a nominal defendant. The lawsuits sought to recover the damages sustained by American Tower Corporation and disgorgement of all profits received with respect to the alleged backdated stock options. In October 2007, the court

contemplated civil enforcement recommendations against such individual for certain violations of the federal securities laws.

³ On May 19, 2006, American Tower Corporation received a subpoena from the United States Attorney's Office for the Eastern District of New York for records and information relating to stock option granting practices. The subpoena requests materials related to certain stock options granted between 1995 and 2006.

⁴ Email response from Michael T. Hallam, on behalf of ATC, on February 2, 2010.

dismissed the complaint, without leave to amend, due to the plaintiffs' failure to make a demand upon American Tower Corporation's Board of Directors before initiating their lawsuits. In December 2007, the plaintiffs filed an appeal of that decision to the Massachusetts Court of Appeals. In June 2008, the Massachusetts Supreme Judicial Court elected, on its own motion, to hear the appeal, and in April 2009, affirmed the judgment dismissing the complaint without leave to amend. The plaintiffs' right to initiate a new claim based on the response to the demand made at the time of dismissal expired in July 2009.

Prior to the 2005 merger of American Tower Corporation and SpectraSite Communications, Inc. ("SpectraSite"), the FCC released a Notice of Apparent Liability for Forfeiture adopted on April 18, 2002 that imposed forfeiture on SpectraSite Communications, Inc. for one failure to register an existing antenna structure; two failures to post the Antenna Structure Registration number in a conspicuous location so that it is visible near the base of the antenna structure; and three failures to replace or repair antenna structure lights, automatic indicators, automatic controls, and alarm systems as soon as practical. In an Order released on October 8, 2002, the FCC stated that SpectraSite had paid \$105,000 of an \$111,000 proposed forfeiture assessment relating to five of the six apparent violations. In that same Order, the FCC cancelled the remaining \$6,000 of the proposed forfeiture.

6. COMPETITIVE SERVICES ANALYSIS FOR PRIVATE LINE SERVICES

6.1 Private Line Services

Private line service is a direct circuit or channel specifically dedicated to the use of an end user organization for the purpose of directly connecting two or more sites in a multi-site enterprise. Private line service provides a means by which customers may transmit and receive messages and data among various customer locations over facilities operated and provided by the Applicant.

6.2 Description of Requested Services

ATC proposes to provide private line service. Private line service is a direct circuit or channel specifically dedicated to the use of an end user organization for the purpose of directly connecting two or more sites in a multi-site enterprise.

6.3 A description of the general economic conditions that exist that make the relevant market for the service one that is competitive.

IXCs hold a substantial share of the private line service market. Also, a number of ILECs and CLECs have been authorized to provide private line service. The Applicant will be entering the market as an alternative provider of private line service and, as such, the Applicant will have to compete with several existing companies in order to obtain customers.

6.4 The number of alternative providers of the service.

IXCs are providers of private line service in the State of Arizona. In addition, ILECs and CLECs also provide private line service.

6.5 The estimated market share held by each alternative provider of the service.

IXCs and ILECs hold a substantial share of the private line market. CLECs likely have a smaller share of the private line market.

6.6 The names and addresses of any alternative providers of the service that are also affiliates of the telecommunications Applicant, as defined in A.A.C. R14-2-801.

None.

6.7 The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms and conditions.

IXCs and ILECs have the ability to offer the same services that the Applicant has requested in their respective service territories. Similarly, many of the CLECs offer substantially similar services.

7. RECOMMENDATIONS

Staff recommends that ATC's Application for a CC&N to provide intrastate telecommunications services, as listed in this Report, be approved. In addition, Staff further recommends:

1. That the Applicant complies with all Commission Rules, Orders and other requirements relevant to the provision of intrastate telecommunications services;
2. That the Applicant be required to notify the Commission immediately upon changes to the Applicant's name, address or telephone number;
3. That the Applicant cooperate with Commission investigations including, but not limited to customer complaints; and
4. That the Commission authorizes the Applicant to discount its rates and service charges to the marginal cost of providing the services.

The rates proposed by this filing are for competitive services. In general, rates for competitive services are not set according to rate of return regulation. Staff obtained information

from ATC estimating that its net book value or fair value rate base, at the end of the first twelve months of operation to be zero. Staff has reviewed the rates to be charged by the Applicant and believes they are just and reasonable as they are comparable to other competitive local carriers offering service in Arizona and comparable to the rates the Applicant charges in other jurisdictions. The rate to be ultimately charged by the Company will be heavily influenced by the market. Therefore, while Staff considered the fair value rate base information submitted by the Company, the fair value information provided was not given substantial weight in this analysis.

Staff further recommends that the Applicant be ordered to comply with the following. If it does not do so, the Applicant's CC&N shall be null and void after due process.

1. The Applicant shall docket conforming tariffs for each service within its CC&N within 365 days from the date of an Order in this matter or 30 days prior to providing service, whichever comes first. The tariffs submitted shall coincide with the Application and state that the Applicant does not collect advances, deposits and/or prepayments from its customers.

8. RECOMMENDATION ON THE APPLICANT'S PETITION TO HAVE ITS PROPOSED SERVICES CLASSIFIED AS COMPETITIVE

Staff believes that the Applicant's proposed services should be classified as competitive. There are alternatives to the Applicant's services. The Applicant will have to convince customers to purchase its services, and the Applicant has no ability to adversely affect the local exchange or interexchange service markets. Therefore, the Applicant currently has no market power in the local exchange or interexchange service markets where alternative providers of telecommunications services exist. Staff therefore recommends that the Applicant's proposed services be classified as competitive.

Attachment A

The following are the states/jurisdictions in which ATC is currently authorized to provide private line telecommunications services similar to those it intends to offer in the State of Arizona:

1. California
2. Connecticut
3. Delaware
4. District of Columbia
5. Florida
6. Georgia
7. Illinois
8. Indiana
9. Kansas
10. Kentucky
11. Louisiana
12. Maryland
13. Massachusetts
14. Michigan
15. Minnesota
16. Missouri
17. Nevada
18. New Hampshire
19. New Jersey
20. New Mexico
21. New York
22. North Carolina
23. Oklahoma
24. Oregon
25. Pennsylvania
26. Rhode Island
27. South Carolina
28. Texas
29. Virginia
30. Washington
31. Wisconsin